NO. 47906-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JERRY BODINE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

RULES, STATUTES AND OTHER AUTHORITITES

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove appellant delivered a controlled substance within 1,000 feet of a school bus route stop.

2. The court acted outside its authority in running two school bus route stop enhancements consecutive to each other on top of the base concurrent sentences.

3. The court abused its discretion in failing to recognize its discretion to waive the enhancements when it imposed an exceptional sentence below the standard range.

Issues Pertaining to Assignments of Error

1. Where the state presented evidence that at the time of trial there was a school bus route stop within 1,000 feet of where the deliveries reportedly occurred but presented no evidence the bus stop existed one year earlier when the deliveries reportedly occurred, did the state fail to prove appellant delivered a controlled substance within 1,000 feet of a school bus route stop?

2. Under State v. Conover, 183 Wn.2d 706, 355 P.3d 1093, 1095 (2015), whether multiple school bus route stop enhancements on different counts run consecutively to each other is determined by resort to RCW 9.94A.589. Under RCW

9.94A.589, consecutive sentences may only be imposed as part of an exceptional sentence above the standard range or if the offenses are serious violent offenses or are certain firearm or driving offenses. None of these exceptions apply here. Did the trial court therefore act outside its authority in running the two school bus route stop enhancements on different counts consecutively to each other?

3. Under State v. Mohamed, 187 Wn. App. 630, 350 P.3d 671 (2015), the court has authority to waive school bus route stops enhancements and impose an alternative sentence. Does the court have the same discretion when it imposes an exceptional sentence below the standard range? If so, did the court abuse its discretion by failing to recognize its discretion to waive the enhancements when it imposed an exceptional down in appellant's case?

B. STATEMENT OF THE CASE[1]

Following a jury trial in Cowlitz County Superior Court, appellant Jerry Bodine was convicted of two counts of delivering heroin within 1,000 feet of a school bus route stop and one count of delivering a material in lieu of a controlled substance. CP 32-36.

The deliveries reportedly occurred on April 8, April 10 and June 25, 2014, near Holt's Market in Longview, located at 464 Oregon Way. CP 8-10; RP 63-68, 74-78, 81-85.

The charges arose after Longview police arrested Deborah Clark on drug charges (two deliveries) and she agreed to become a confidential informant to work off those charges. RP 94-95, 164. As part of the deal, Clark provided a list of potential targets to the police, including Bodine. RP 96-97. Each of the buys was for a "user amount" of heroin, weighing one tenth of a gram and worth $20.00. RP 65, 75, 193, 195, 198-99.

To prove the deliveries occurred within 1,000 feet of a school bus route stop, the state offered the testimony of Longview school district transportation manager Rick Lecker and the Longview geographic information systems (GIS) coordinator Ruth Bunch-Manwell. RP 180-88. Lecker testified part of his job is to locate bus stops. RP 180. In determining where to locate a bus stop, he testified: "we determine where kids live and then we place a bus stop within safe walking distance of their homes." RP 180.

Regarding whether there was a school bus route stop near Holt's market, the prosecutor elicited the following:

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[1] This brief refers to the transcripts as follows: "RP" – jury trial on July 16-17,

Q. [prosecutor] Okay. Are you familiar with the area of 464 Oregon Way, Holt's Market?

A. [Leckler] I am.

Q. Okay. And, to your knowledge, is there any bus stops located in the vicinity of Holt's Market?

A. There is a bus stop there at 1465 Baltimore.

Q. Okay. And what schools does that bus stop service?

A. Cascade Mark Morris.

Q. Okay. And are those readily identifiable school buses that stop at that location?

A. Yes.

Q. Okay.

MR. BRITTAIN: I don't have any other questions for this witness, Your Honor.

RP 181.

The day of Leckler's testimony was July 17, 2015. RP 170, 180. The prosecutor never asked whether there was a bus stop at that location over a year earlier in April 2014, when the deliveries actually occurred. RP 180-81.

Bunch-Manwell testified she is in charge of the mapping applications for the city of Longview. RP 182. At the prosecutor's behest, she made a map depicting two addresses that were

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2015 and sentencing on August 6, 2015; 1RP – sentencing on August 4, 2015.

supplied to her: 464 Oregon Way and a bus stop, presumably the one Leckler testified about. RP 184, 187. At the bus stop location, Bunch-Manwell placed a star with a thousand foot buffer around it. RP 186. She did not testify about any particular school bus route stops in existence at the time of the reported deliveries. RP 182-88.

The standard range for each of the two heroin deliveries was 60-120 months, and each carried a 24-month sentencing enhancement. CP 65. The state asserted the court was required to run the sentencing enhancements consecutively to the concurrent base sentences for the deliveries and consecutively to each other. In other words, the state asserted the standard range was 60-120 months + 24 months (enhancement count I) + 24 months (enhancement count II), for a total range of 108-168 months. 1RP 5. The state asked for a total sentence of 120 months. 1RP 8.

The defense argued an exceptional sentence below the standard range of 30 months was appropriate, due to the "unique chronology involved with the commission of the offense and [Bodine's] arrest and the quantities involved." CP 37. As indicated, the controlled buys occurred on April 8, April 10 and June 25, 2014.

However, Bodine was not arrested on these offenses until March 2015. RP 34-35.

Meanwhile, Bodine was arrested in October 2014 for possessing heroin, pled guilty and received a residential drug offender sentencing alternative (DOSA) in December 2014. He had just completed the treatment component and was discharged from American Behavioral Health System (ABHS) when he was arrested for the deliveries. CP 37. Bodine's pastor and mentor at ABHS wrote a glowing report of his progress, stating: "Jerry is a new man." CP 92-93. Bodine's sister also spoke at sentencing of Bodine's complete transformation. 1RP 11-14 ("I can't tell you enough how much of a difference treatment has made").

As defense counsel argued:

> The chronology writ large paints a troubling picture: that a residential DOSA sentence may not be the ticket to meaningful recovery that someone believes it to be. Regardless of whether it should be a consideration of law enforcement and/or the prosecuting attorney to weigh whether a person is trying to turn his life around before arresting and filing charges in the way that occurred here, it is certainly within the purview of the court to look at mitigating factors.
>
> Here, Mr. Bodine was never given a meaningful opportunity to achieve sobriety through his DOSA program before he was arrested and charged with the prior offenses. To allow the full range sentence, including enhancements, to fall on his

> shoulders would be an injustice. Also, the quantities involved were quite small: tenths of a gram. If any scenario is consistent with a struggling addict selling drugs to maintain a habit, rather than out of any aspiration to climb the ladder of organized crime, this is it.

CP 37-38.

The court agreed the circumstances warranted mitigation and imposed an exceptional down of 50 months. 1RP 21. According to the court's calculation: "Each of them carries 24 months and that has to run back-to-back, so that's a total of 98 months." 1RP 21.

Defense counsel interjected that the court in its discretion could go below the standard range, including the enhancements. Defense counsel knew of a recent case addressing such discretion but could not think of the name. 1RP 22. The court set the matter over so defense counsel could provide additional briefing. 1RP 23.

Defense counsel thereafter filed a supplemental brief citing State v. Mohamed, 187 Wn. App. 630 (2015), for the proposition the court could, in its discretion, waive the enhancements. CP 39. Alternatively, counsel argued the court could impose concurrent enhancements and attached another defense attorney's

supplemental brief to the Supreme Court in State v. Conover, 183 Wn.2d 706 (2015), which had not been decided yet. CP 40-60.

At the sentencing hearing, defense counsel argued that under Mohamed, the standard range for an offense includes the sentencing enhancement, and that the court could impose an exceptional sentence below that range. RP 253-54. Alternatively, defense counsel urged the court to follow the reasoning put forward by the petitioner in Conover and run the enhancements concurrently. RP 254.

The court disagreed it had authority to do either:

> All right. So when we were here on Tuesday, there was a representation that potentially there is some authority to change the consecutive nature of the enhancements. I think the current state of the law is that those enhancements have to be served consecutively. I think that's still the law, so I need to follow that.
>
> I think the Mohammad case or the Mamoud (phonetic) case, I'm not sure how to pronounce it, but that case that Mr. Debray references, that's clearly in the DOSA context, and the DOSA is kind of a special breed, and I think it's distinguishable from what's happening here.
>
> So in my mind I was thinking that there might be some very clear authority that would allow something different. I'm not seeing that, so the prior order of the court remains.

RP 257. This appeal follows. CP 76-89.

C. ARGUMENT

1. THE STATE FAILED TO PROVE THE SCHOOL BUS ROUTE STOP ENHANCMENTS BEYOND A REASONABLE DOUBT.

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; In re Matter of Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction must be reversed for insufficient evidence where no reasonable fact finder would have found all the elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003). The same is true of enhancements. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2538, 159 L.Ed.2d 403 (2004).

Under RCW 9.94A.533(6):

> (6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.435 provides:

> (1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing

> with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:
>
> (a) In a school;
>
> (b) On a school bus;
>
> (c) Within one thousand feet of a school bus route stop designated by the school district;
>
> . . . or
>
> (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

Emphasis added.

Under the statute, the state was required to prove Bodine delivered a controlled substance within 1,000 feet of a school bus route stop. This means the state was required to prove there was a school bus route stop within 1,000 feet of the delivery *at the time of the delivery*. Otherwise, Bodine did not deliver within 1,000 feet of a school bus route stop.

The state presented no such evidence. The closest it came was when Leckler testified: "There is a bus stop there at 1465 Baltimore." RP 181 (emphasis added). But he did not say – nor did the state ask – if it was there in April 2014, during the critical time frame.

Nor can such be inferred from the record. Leckler testified he picks bus stops based on where children are living and what would be considered a safe walking distance from their homes. However, there was no evidence of children in the vicinity at the time of the alleged deliveries. In short, there was no evidence establishing the school bus route stop depicted on the map existed on the date of the offenses.

This Court therefore should reverse and dismiss the sentencing enhancements with prejudice. State v. Hardesty, 129 Wash.2d 303, 309, 915 P.2d 1080 (1996) ("The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence.") (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), overruled in part on other grounds by

Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)).

2. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING CONSECUTIVE SCHOOL BUS ROUTE STOP ENHANCEMENTS.

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

RCW 9.94A.533(6) provides:

> An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. *All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.*

Emphasis added.

Our state Supreme Court recently interpreted this italicized language as not requiring that multiple school bus route stop enhancements on different counts be run consecutively to each other. State v. Conover, 355 P.3d 1093, 1094. In so holding, the Court primarily relied on its decision in In re Post Sentencing

Review of Charles, 135 Wn.2d 239, 955 P.2d 798 (1998), in which it interpreted virtually identical statutory language as ambiguous. Following Charles, the Conover Court held that whether multiple school bus route stop enhancements on different counts run concurrently or consecutively is determined by resort to RCW 9.94A.589(1)(a). Conover, 355 P.3d at 1094.

Under RCW 9.94A.589:

> (1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. . . .
>
> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences

> imposed under this subsection (1)(b) shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.
>
> (c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.
>
> (d) All sentences imposed under RCW 46.61.502(6), 46.61.504(6), or 46.61.5055(4) shall be served consecutively to any sentences imposed under RCW 46.20.740 and 46.20.750.

None of the exceptions for consecutive sentencing apply here. The court did not impose consecutive sentences as part of an aggravated sentence. Delivery is neither a serious violent offense nor an offense involving a firearm or one of the enumerated driving offenses. There was therefore no authority for the court to impose consecutive school bus route stop enhancements. This Court should therefore reverse and remand for resentencing. Conover, 355 P.3d at 1094, 1100.

3. THE COURT ABUSED ITS DISCRETION WHEN IT FAILED TO RECOGNIZE ITS DISCRETION TO WAIVE THE ENHANCEMENTS.

A trial court abuses its discretion when its decision is "manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). All defendants have the right to the trial court's examination of available sentence alternatives. In re Restraint of Mulholland, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A trial court's failure to exercise its discretion or to understand the breadth of its discretion is an abuse of discretion. See State v. Mohamed, 187 Wn. App. at 634, 646.

As defense counsel argued at sentencing, the court had discretion to waive the enhancements when it imposed an exceptional sentence down, under this Court's decision in Mohamed. In that case, this Court considered whether the trial court abused its discretion in declining to impose an alternate sentence under either the DOSA or the Parenting Sentencing Alternative (PSA). Mohamed, 187 Wn. App. at 634-34.

Mohamed was convicted of four counts of delivery and three school zone enhancements. The parties agreed each delivery carried a base standard range of 20-60 months and that school

zone enhancements applied to each of the three convictions on the special allegations. Whereas the defense asked the court to impose a DOSA or PSA, the state argued that sentence alternatives "only waive imposition of the standard range part of a sentence" and that sentencing enhancements are separate from the standard range. Mohamed, 187 Wn. App. at 634 (citation to record omitted).

The state therefore took the position that Mohamed was required to serve 72 months for the sentencing enhancements. The court agreed stating: "There has to be a 72-month sentence [enhancement]. I have no choice in the matter." Id. (citation to record omitted). Accordingly, the court imposed concurrent sentences of 20 months on the deliveries plus three school zone enhancements to be served consecutively to each other and consecutively to the delivery sentences for a total sentence of 92 months. Id.

The DOSA statute provides:

> If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential

> chemical dependency treatment-based alternative under RCW 9.94A.664.

RCW 9.94A.660(3) (emphasis added).

Similarly, the PSA statute provides:

> If the sentencing court determines that the offender is eligible for a sentencing alternative under this section and that the sentencing alternative is appropriate and should be imposed, the court shall waive imposition of a sentence within the standard range and impose a sentence consisting of twelve months of community custody. The court shall consider the offender's criminal history when determining if the alternative is appropriate.

RCW 9.94A.655(4) (emphasis added).

Therefore, the pivotal question before this Court was whether the standard range includes school zone sentencing enhancements. Mohamed, 187 Wn. App. at 638. In holding that it does, this Court adopted the reasoning of Gutierrez v. Department of Corrections, 146 Wn. App. 151, 188 P.3d 546 (2008). Mohamed, 187 Wn. App. at 640.

Gutierrez pled guilty to delivery and stipulated that the offense occurred within 1,000 feet of a school bus route stop. The enhancement added 24 months to a base standard range of 12 to 20 months. The parties jointly recommended a DOSA. The DOSA statute required the court to impose a sentence at the midpoint of

the "standard sentencing range" and to divide that time evenly between incarceration and community custody. Gutierrez, 146 Wn. App. at 153.

Based on the base range and the enhancement, the trial court concluded that a standard range of 36 to 44 months applied at sentencing. The court thereafter imposed a mid-range sentence of 40 months and suspended half that time, effectively requiring Gutierrez to serve 20 months in prison and 20 months in community custody. Id.

The department of corrections (DOC) challenged the sentence on grounds Gutierrez was required to serve the entire 24-month enhancement in total confinement. DOC argued the DOSA portion of the sentence should be based on a 16-month sentence, the midpoint between the 12 to 20 base range, exclusive of the 24-month enhancement. Gutierrez, at 154.

Division Three disagreed. After reviewing the drug crime enhancement statute, the definition of standard range sentence under the Sentencing Reform Act and related case law, it stated: "Uniformly, the enhanced range is considered a standard range term and a departure from that range is an exceptional sentence." Gutierrez, at 155. The court reasoned the trial court's approach

was also consistent with the command of the first sentence of the enhancement statute that the enhancement be "added to the range rather than treated as a separate sentencing provision." Gutierrez, at 155.[2] As the Gutierrez court noted: "Courts have routinely interpreted this command, as in the case of other enhancements, as increasing each end of the initial base range by the length specified for the enhancement." Id. The court concluded, "A sentence range increased by an enhancement is still a standard range sentence." Id.

Applying Gutierrez to Mohamed's case, this Court concluded the trial erred in failing to consider waiving the school zone enhancements:

> As for the alternative sentences request, neither party brought Gutierrez to the attention of the sentencing court. Thus, the court was unaware of the reasoning of that case. Without the benefit of that knowledge, the court concluded that it lacked the authority to waive the enhancements if it chose to impose an alternative sentence.
>
> The failure to consider waiving the school zone enhancements and imposing a DOSA or PSA was error. That is because both of the governing statutes permit the waiver of "a sentence within the standard sentence range" if the court believes an offender is eligible for such an alternative sentence. Because "standard range" means the base sentence range plus the enhancement of such range, a sentencing

[2] Under 9.94A.533(6), "An additional twenty-four months shall be added to the standard sentence range . . ." Emphasis added.

> court may waive the enhancements as part of the standard sentence range under a DOSA or PSA.

Mohamed, 187 Wn. App. at 641.

This Court's analysis in Mohamed applies with equal force here, where the court imposed an exceptional sentence below the standard range. Under RCW 9.94A.535:

> The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

Emphasis added.

Under Gutierrez and Mohamed (and Conover), Bodine's standard sentence range was 84-144 months. Under RCW 9.94A.535, the court was authorized – if it found substantial and compelling reasons (which it did) – to impose a sentence outside of this range. Thus, defense counsel was correct in advising the court it essentially could waive the enhancements. There is no meaningful distinction between a statute that authorizes waiving the imposition of a standard range sentence (DOSA) and a statute that authorizes imposition of a sentence outside of the standard range (exceptional sentence). They are different ways of saying the same

thing. The court can impose something other than what is in that range.

Just like the court in Mohamed, the court here did not understand its full sentencing discretion. The record indicates the court was open to imposing a shorter sentence than it did. This Court should therefore reverse and remand for resentencing. Mohamed, at 647.

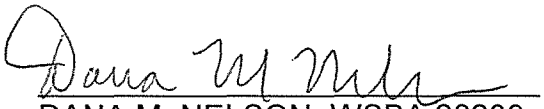
D. CONCLUSION

Because the state failed to prove there was a school bus route stop in existence at the time of the deliveries, the enhancements should be reversed and dismissed altogether. Alternatively, this Court should reverse and remand for resentencing so the trial court may properly exercise its discretion to impose an appropriate sentence, one that would not include consecutive enhancements and takes into account its full sentencing discretion.

Dated this 21st day of December, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 47906-1-II
	)	
JERRY BODINE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF DECEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JERRY BODINE
DOC NO. 928173
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF DECEMBER, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

December 21, 2015 - 4:27 PM

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